and made livery of seisin to him, at the same time granting him an authority, in the nature of a power appendant to his estate, to convey to a third person in fee, the donee, seised in fact, made livery as his own act, and the grantee received the seisin, not from the original owner, who was no longer seised, but from the donee of the power, and, by virtue of the authority of the donor, received it free from claims by or through him, thus being endowed with an estate greater than the donee had ever had. By the making of the deed and the giving of the additional power, the grantor had done all that was necessary on his part to complete the alienation, and his continued life was therefore unnecessary to preserve the existence of the power.[15] It follows from the same principle, that where the grantor gave with the life estate an authority to devise in fee, thus creating a power in gross, the authority survives, and the appointment made thereunder is good. These principles were involved in the recent case of *Dixon* v. *Dixon* (Kan. 1911) 116 Pac. 886. A husband having conveyed real property to his wife for life, with a power to devise the fee to one or more of the children, died before she made the appointment, and the Supreme Court of Kansas quite properly held that the appointment was good. A consistent application of the foregoing doctrines, it is submitted, would have avoided the confusion which, as above indicated,[16] prevails among the authorities. A great part of these cases apparently result in a rule giving the donee of the power an authority to compel the heir or personal representative of the donor to make the disposition of the subject-matter necessary to effectuate the latter's intention, and ignore the true limitations of the much abused maxim that a power coupled with an interest survives.

EXERCISE OF A POWER OF APPOINTMENT AS AFFECTING THE RELATION OF THE APPOINTOR TO THE SUBJECT-MATTER.—A power of appointment being a power of disposition given to a person over property not his own by one who directs the mode in which that power shall be exercised,[1] the existence of such a power implies no other relation between the subject-matter and the donee than a mere authority on the part of the latter to designate the person to whom the property is to go. The donee takes no estate by virtue of the power,[2] and even in the case of a life estate, the fact that the holder may have a power to appoint the remainder does not enlarge or affect that estate.[3] Nor is a power liable to be attached or taken in execution.[4] Consequently property subject to a power of appointment is in no sense assets of the appointor so long at least as the power remains unexecuted.[5] Thus if one by will authorizes his executors to sell his lands they are able to give a good title; yet the executors thereby take no estate, that being

[15]See Co. Litt., (Hargrave's 13th ed.) 52-*b*; 1 Sugden, Powers, (7th ed.) 122.

[16]See cases cited in note 7 *supra*.

[1]Freme *v.* Clement (1881) 50 L. J. Ch. 50; see Farwell, Powers, 1.

[2]Goodill *v.* Brigham (1798) 1 B. & P. 192; Burleigh *v.* Clough (1872) 52 N. H. 267; Farwell, Powers, 2.

[3]Livingston *v.* Murray (1877) 68 N. Y. 485.

[4]Holmes *v.* Coghill (1806) 12 Ves. Jr. 206.

[5]*Ex parte* Gilchrist (1886) L. R. 17 Q. B. D. 521.

in the heirs until the power is exercised.[6] Nor does the exercise of the power give the appointor any estate in the property; clearly the executors, in the case supposed above, can have no interest after the sale of the property. On the contrary, the exercise of the power is not an act of dominion or ownership and does not operate as a conveyance or devise.[7] It may be performed by one who could not legally do the same act with reference to his own property, as in the cases of an infant[8] and of a married woman,[9] a fact which shows that the effect is not momentarily to vest the property in the appointor and pass it thence to the appointee. On the contrary, a power of appointment is only an authority enabling one person to dispose of the interest that is vested in another,[10] and what is done under it is to be attributed to the instrument which created the power, and not to that by which it was exercised.[11] The situation, then, amounts to this, that the power operates upon a stranger's property in favor of a stranger, without in any manner affecting the estate of the appointor.[12] Accordingly it has been held that appointed property cannot be taxed under a statute as a legacy of the appointor, as the legacy is not his, but that of the donor of the power.[13]

Consequently it seems clear that the act of exercising a power of appointment cannot give the appointor any greater interest in the subject-matter than he previously possessed, and upon principle the established rule that one who exercises a general power of appointment over property thereby renders it his assets for the purpose of satisfying his creditors, is therefore unsound.[14] This departure from principle seems to have resulted from extending the authority of certain cases beyond what the facts called for. The doctrine originated[15] in cases where one conveying property, at the time of the conveyance reserved a power of appointment over the same property,[16] a practice which manifestly might result in frauds upon creditors unless it were held to render the subject-matter assets of the appointor; and Lord Hardwicke regarded the rule as analogous to that against fraudulent conveyances.[17] From these cases the rule by a not unnatural mis-

[6]Farwell, Powers, 2.

[7]Heath *v.* Withington (Mass. 1850) 6 Cush. 497; Osgood *v.* Bliss (1885) 141 Mass. 474; Roach *v.* Wadham (1805) 6 East 289; *In re* Devon's Settled Estates, L. R. [1896] 2 Ch. 562.

[8]*In re* d'Angibau (1880) L. R. 15 Ch. Div. 228.

[9]Burnett *v.* Mann (1748) 1 Ves. Sr. 156; see Peacock *v.* Monk (1750) 2 Ves. Sr. 190.

[10]Goodill *v.* Brigham *supra;* Osgood *v.* Bliss *supra;* see Wales' Admr. *v.* Bowdish's Exr. (1888) 61 Vt. 23.

[11]Heath *v.* Withington *supra;* Osgood *v.* Bliss *supra;* Roach *v.* Wadham *supra; In re* Devon's Settled Estates *supra.*

[12]Heath *v.* Withington *supra.*

[13]Emmons *v.* Shaw (1898) 171 Mass. 410.

[14]Comw. *v.* Daffield (1849) 12 Pa. 277; Wales' Admr. *v.* Bowdish's Exr. *supra;* Clapp *v.* Ingraham (1879) 126 Mass. 200; 1 Story, Eq. Jur., (13th ed.) § 176 and note.

[15]Thompson *v.* Towne (1694) 2 Vern. 319 is said to be the original case. See Wales' Admr. *v.* Bowdish's Exr. *supra;* Clapp *v.* Ingraham *supra.*

[16]Thompson *v.* Towne *supra;* Lord Townshend *v.* Windham (1750) 2 Ves. Sr. 1; see Wales' Admr. *v.* Bowdish's Exr. *supra.*

[17]Lord Townshend *v.* Windham *supra.*

apprehension came to embrace all those where a general power of appointment is exercised, even though the donee never had any interest in the subject-matter;[18] an extension which seems unfortunate since it leaves out of view the fact that what is being done affects the donor's property and is done under his instrument and pursuant to his intention, thus depriving him of the possibility of leaving to another's discretion the disposition, for instance, of a remainder, without subjecting it to the payment of that other's debts.[19]

Though the application of the rule to cases involving creditors' rights seems thoroughly established, yet in view of the foregoing considerations any extension of it to cases where there is no question of such rights, would seem to be undesirable. Nevertheless, in *In re Pryce* (1911) 58 L. J. Ch. Div. 525, such an extension has been made. A domiciled Dutchwoman had under an English will the income for life of a trust estate in the hands of English trustees, the property after her death to be held on trust for such persons as she should by will appoint. By her will she appointed her husband as her sole heir to so much of her property as under the law she could dispose of in his favor.[20] Under the Dutch law he could take but seven-eighths of the testatrix's property and the court held that that law was applicable to the property subject to the power of appointment, conceiving that since the exercise of a general power of appointment renders the subject-matter assets for the benefit of creditors, it must render it assets in such sense as to subject it to the law of the domicile of the appointor. Had the court adopted the view, conformable to sound principle, that the testatrix by exercising the power in her will acted as the proxy of the donor of the power, and caused the property to pass to her husband not by virtue of the will, but under the instrument creating the power, and direct from the trustees to the appointee, a different result would have been reached. It is submitted that this is the view which the court should have taken.

CONTRIBUTION BETWEEN JOINT TORT-FEASORS.—The expansion of the right to contribution is an excellent example of the flexibility with which the common law adjusts itself to changing economic conditions. Applied first to contracts[1] and confined to the jurisdiction of equity, it was not until the beginning of the last century that even a surety was allowed to sue at law for contribution from his co-sureties.[2] Accordingly, when this right was invoked as a result of a judgment in tort, and was, moreover, advanced in an action on the case, it is not surprising to find that it was summarily denied. The decision in this case of *Merryweather* v. *Nixan*[3] was supposed to embody the general rule that no contribution should be allowed between joint tort-feasors, and for a time it was followed with undue strictness. The considera-

[18]Clapp *v.* Ingraham *supra*; Olney *v.* Balch (1891) 154 Mass. 318.

[19]But see Clapp *v.* Ingraham *supra*, where the rule is referred to as eminently just.

[20]In England, under the Wills Act, 1 Vict. c. 26 § 27, these words would operate as an execution of the power.

[1]See counsels' arguments in Lingard *v.* Bromley (1812) 1 Ves. & Beame 114.

[2]Cowell *v.* Edwards (1800) 2 B. & P. 268.

[3](1799) 8 Term Rep. 186.